Supreme Court, U.S.
FILED
AUG 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

87-343

No. 87—

In The
Supreme Court of the United States
October Term, 1987

STATE OF MONTANA; JOHN D. LaFAVER, Director, Montana Department of Revenue; BIG HORN COUNTY, Montana; TREASURE COUNTY, Montana, YELLOWSTONE COUNTY, Montana; LORRAINE HAMILTON, Treasurer, Big Horn County, Montana; KATHLEEN THOMAS, Treasurer, Treasure County, Montana; and MAY JENKINS, Treasurer, Yellowstone County, Montana,

Appellants,

vs.

CROW TRIBE OF INDIANS; UNITED STATES OF AMERICA; and WESTMORELAND RESOURCES, INC.,

Appellees.

ON APPEAL FROM THE NINTH CIRCUIT COURT OF APPEALS

JURISDICTIONAL STATEMENT

MICHAEL T. GREELY*
Attorney General of Montana
CLAY R. SMITH
Assistant Attorney General
State of Montana
Justice Building
215 North Sanders
Helena, MT 59620-1401
(406) 444-2026

JOHN W. Ross
Special Assistant Attorney General
P.O. Box 849
Billings, MT 59103
(406) 248-2611
Attorneys for the Appellants

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

35 pp

QUESTIONS PRESENTED

1. Is application of the Montana gross proceeds tax and the Montana coal severance tax preempted by federal law as to a non-Indian producer engaged in the mining of tribally-owned coal underlying lands outside the exterior boundaries of the Crow Indian Reservation?

2. Does a justiciable or ripe controversy appropriate for declaratory judgment relief exist concerning whether application of the Montana gross proceeds tax and the Montana coal severance tax to the mining of coal within the exterior boundaries of the Crow Indian Reservation is preempted by federal law? If so, is the present record sufficiently developed to make the required determination?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	3
I. PROCEDURAL HISTORY	3
II. RELEVANT FACTS	4
A. *Reservation and Ceded-Strip History*	4
B. *Ceded-Strip and Reservation Coal Mining*	5
C. *The State Taxes*	7
III. DISTRICT COURT AND APPELLATE DECISIONS	9
THE QUESTIONS PRESENTED ARE SUBSTANTIAL	14
I. THE VALIDITY OF THE GROSS PROCEEDS AND SEVERANCE TAXES AS TO CEDED-STRIP PRODUCTION IS A MATTER OF SIGNIFICANT IMPORTANCE TO THE PARTIES AND PRESENTS A SUBSTANTIAL FEDERAL QUESTION	14
A. *Preemption by Federal Statute*	15
B. *Infringement on Tribal Sovereignty*	22

TABLE OF CONTENTS—Continued

Page

II. THE COURT OF APPEALS' DETERMINATION THAT A JUSTICIABLE OR RIPE CONTROVERSY EXISTS CONCERNING THE ON-RESERVATION VALIDITY OF THE GROSS PROCEEDS AND SEVERANCE TAXES RAISES A SUBSTANTIAL FEDERAL QUESTION 24

CONCLUSION 26

TABLE OF AUTHORITIES

Page

Cases

Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937) 25

Babbitt v. United Farm Workers National Union, 442 U.S. 289 (1979) 25

California v. Cabazon Band of Mission Indians, 107 S. Ct. 1083 (1987) ..... *passim*

California State Board of Equalization v. Chemehuevi Indian Tribe, 106 S. Ct. 289 (1985) (*per curiam*) 20

Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1937) 21

Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) 25

Commonwealth Edison Company v. Montana, 189 Mont. 191, 615 P.2d 847 (1980), *aff'd*, 453 U.S. 609 (1981) 19

Crow Tribe v. Montana, 650 F.2d 1104 (9th Cir. 1981), *amended*, 665 F.2d 1390, *cert. denied*, 459 U.S. 916 (1982) ..... *passim*

Hodel v. Virginia Surface Mining & Reclamation Association, 452 U.S. 264 (1981) 25

Little Light v. Crist, 649 F.2d 683 (9th Cir. 1981) (*per curiam*) 4

Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) ..... *passim*

Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976) 20

Montana v. Blackfeet Tribe, 471 U.S. 759 (1985) 16, 21

National Farmers Union Insurance Companies v. Crow Tribe, 471 U.S. 845 (1985) 15

TABLE OF AUTHORITIES—Continued

Page

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) 19

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) 15

Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission, 461 U.S. 190 (1983) 25

Ramah Navajo School Board v. Bureau of Revenue, 458 U.S. 832 (1982) ..... *passim*

Rice v. Rehner, 463 U.S. 713 (1983) 22, 23

Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980) 20, 23, 24

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) ..... *passim*

OTHER AUTHORITIES

Code of Federal Regulations
Title 25, part 211 (1987) 2

Federal Register
49 Fed. Reg. 38462 (Sept. 28, 1984) 6

Federal Rules of Civil Procedure
Rule 52(a) 12, 17

Montana Code Annotated (1985)
Sections 15-23-701 to 704 ..... 1, 2, 9
Section 15-35-102(5) 7, 9
Section 15-35-102(5)(a)-(d) 7
Section 15-35-103(1) 7
Section 15-35-104 7

TABLE OF AUTHORITIES—Continued

Page

Section 15-35-108 8

Sections 15-35-101 to 205 ..... *passim*

Sections 82-4-201 to 254 6

Montana Constitution

Article IX, § 5 ..... 2, 8

Montana Session Laws

Chapter 636 (1985) 7

Chapter 608 (1987) 7

Chapter 662 (1987) 8

Senate Reports

S. Rep. No. 985, 75th Cong., 1st Sess. (1937) 21

S. Rep. No. 1508, 85th Cong., 2d Sess. (1958) 17

Treaties

1851 Treaty of Fort Laramie (2 C. Kappler, *Indian Affairs, Laws, and Treaties* 594 (1904)) 4

1868 Treaty of Fort Laramie, 15 Stat. 649 4

United States Code

25 U.S.C. § 465 15

28 U.S.C. § 1254(2) 1

28 U.S.C. § 1331 1

TABLE OF AUTHORITIES—Continued

	Page
28 U.S.C. § 1343	1
28 U.S.C. § 1345	1
28 U.S.C. § 1362	1
30 U.S.C. §§ 86 to 89	2
30 U.S.C. §§ 1201 to 1328	6
30 U.S.C. § 1235	6
30 U.S.C. § 1291(9)	6
United States Constitution	
Article VI, clause 2	1
United States Statutes at Large	
15 Stat. 649	4
22 Stat. 157	4
26 Stat. 1039	4
33 Stat. 352	2, 4
39 Stat. 944	2
41 Stat. 751	2
44 Stat. 566	2, 4
44 Stat. 658	2
45 Stat. 482	2, 4
50 Stat. 884	2, 4
52 Stat. 347	*passim*
72 Stat. 121	2, 4
72 Stat. 575	*passim*

TABLE OF AUTHORITIES—Continued

Page

73 Stat. 565 2

82 Stat. 123 2

13A C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3532.1 (2d ed. 1984) 25

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The court of appeals' opinion is reported at 819 F.2d 895, and is reproduced in the appendix at 1a-21a. The district court's findings of fact and conclusions of law are not officially reported and are reproduced at 22a-74a. An earlier court of appeals' decision, *Crow Tribe v. Montana,* 650 F.2d 1104 (9th Cir. 1981), *amended,* 665 F.2d 1390, *cert. denied,* 459 U.S. 916 (1982), is reproduced at 79a-106a.

———o———

JURISDICTION

This is an appeal from an opinion and judgment of the Ninth Circuit Court of Appeals entered June 11, 1987, holding preempted by federal law the application of the Montana coal gross proceeds tax, Mont. Code Ann. § 15-23-701 to 704 (1985), and the Montana coal severance tax, Mont. Code Ann. §§ 15-35-101 to 205 (1985), to an area outside the exterior boundaries of the Crow Indian Reservation, known as the ceded strip, and to the reservation itself. Jurisdiction below was predicated on 28 U.S.C. §§ 1331, 1343, 1345, and 1362. A notice of appeal with respect to the court of appeals' opinion and judgment was filed on July 24, 1987, with that court and is reproduced in the appendix at 107a-109a. Appellate jurisdiction of this Court is invoked under 28 U.S.C. § 1254(2).

———o———

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

A. The relevant federal constitutional provision is Article VI, clause 2, reproduced in the appendix at 135a.

The relevant federal statutes and regulatory provisions are reproduced in the appendix as noted:

The Act of April 27, 1904, 33 Stat. 352 (App. 136a-157a)

The Act of February 17, 1917, 39 Stat. 944 (*codified in* 30 U.S.C. §§ 86 to 89) (App. 158a-160a)

The Act of June 4, 1920, §§ 1 and 6, 41 Stat. 751 (App. 161a-163a)

The Act of May 19, 1926, 44 Stat. 566 (App. 164a)

The Act of May 26, 1926, §§ 1 and 6, 44 Stat. 658 (App. 165a-168a)

The Act of May 2, 1928, 45 Stat. 482 (App. 169a)

The Act of August 31, 1937, 50 Stat. 884 (App. at 170a-171a)

The Act of May 11, 1938, 52 Stat. 347 (*codified as amended in* 25 U.S.C. §§ 396a to 396g) (App. 172a-175a)

The Act of May 19, 1958, 72 Stat. 121 (App. 176a-177a)

The Act of August 14, 1958, 72 Stat. 575 (App. 178a-180a)

The Act of September 16, 1959, 73 Stat. 565 (App. 181a-182a)

The Act of May 17, 1968, 82 Stat. 123 (App. 183a)

Portions of Title 25, part 211 of the 1987 Code of Federal Regulations (App. 184a-204a).

B. The relevant state constitutional provision is Mont. Const. Art. IX, § 5, reproduced in the appendix at 205a. The relevant state statutes are the Montana coal gross proceeds tax, Mont. Code Ann. §§ 15-23-701 to 704 (1985), reproduced at 206a-207a, and the Montana coal severance tax, Mont. Code Ann. §§ 15-35-101 to 205 (1985), reproduced at 208a-226a.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

The Crow Tribe of Indians instituted the action below in 1978. The complaint, as finally amended, contained various claims generally contending that the Montana coal gross proceeds tax, Mont. Code Ann. §§ 15-23-701 to 704 (1985), and the Montana coal severance tax, Mont. Code Ann. §§ 15-35-101 to 205 (1985), are preempted by federal law with respect to production of coal beneficially owned by the Tribe in an area outside its reservation's boundaries known as the "ceded strip" and within the reservation's exterior boundaries. (App. 110a-125a.) Several months after the initial complaint was filed, appellee Westmoreland Resources, Inc. intervened as a party-defendant. Westmoreland is a Delaware corporation which mines tribally-owned coal on the ceded strip and has paid all of the gross proceeds and severance taxes at issue here. The Tribe's second amended complaint was dismissed by the district court in 1979 for failure to state a claim upon which relief could be granted; however, that determination was reversed and the matter remanded for trial in *Crow Tribe v. Montana*, 650 F.2d 1104 (9th Cir. 1981), *amended*, 665 F.2d 1390, *cert. denied*, 459 U.S. 916 (1982) (*Crow I*). After remand, appellee United States intervened as a party-plaintiff.

A 12-day, nonjury trial occurred during early 1984, and in September 1985 the district court entered extensive findings of fact, conclusions of law, and a judgment (App. 77a-78a) in favor of the appellants[1] and dismissing the

---

[1]The appellants include the State of Montana, the Director of the Montana Department of Revenue, three counties—Big Horn, Treasure, and Yellowstone—and those counties' treasurers. The individual appellants were sued only in their official capacities. Unless otherwise textually required, the appellants will be referred to collectively as Montana.

preemption claims. The Tribe and United States appealed, and the court of appeals reversed the district court's judgment in its entirety on June 11, 1987.

II. RELEVANT FACTS

A. Reservation and Ceded-Strip History

The Crow Indian Reservation was initially created under the 1851 Treaty of Fort Laramie, 2 C. Kappler, *Indian Affairs, Laws, and Treaties* 594 (1904). The 1868 Treaty of Fort Laramie, 15 Stat. 649, and three later cession laws, 22 Stat. 157 (1882), 26 Stat. 1039 (1891), and 33 Stat. 352 (1904), reduced the reservation to its present boundaries.[2] The third of those statutes, the 1904 Act, severed from the reservation an area commonly known as the ceded strip, which consists of approximately 1.1 million acres and lies immediately north of the present reservation. *Little Light v. Crist,* 649 F.2d 683, 685 (9th Cir. 1981) (*per curiam*). Substantial homesteading activity occurred on the ceded strip pursuant to several presidential proclamations, and, at the time of trial, 93.9 per cent of the surface acreage was owned in fee by non-Indians, 3.8 percent was owned by Montana, 1.5 percent had been allotted to tribal members,[3] and .8 percent was held in trust for the Tribe. As of 1980, 99 percent of ceded strip residents were non-Indian. Through the Act of May 19, 1958, 72 Stat. 121 (1958 Act), 10,260.95 acres

---

[2]Although not modifying the exterior boundaries of the reservation, the Act of August 31, 1937, 50 Stat. 884, later excluded the city of Hardin from it.

[3]Articles III and IX, section 4 of the 1904 Act, 33 Stat. 358-59, preserved the allotment status of any ceded-strip lands which had previously been allotted and further provided an opportunity to members residing within the strip to receive allotments of land then occupied by them. Later statutes provided for additional allotment of ceded-strip property. *See* Act of May 19, 1926, 44 Stat. 566; and Act of May 2, 1928, 45 Stat. 482.

of vacant and undisposed-of land ceded pursuant to the 1904 Act were restored to tribal ownership. The restored acreage constituted the only surface property within the ceded strip not patented, allotted, or otherwise conveyed by the United States prior to passage of the 1958 Act. Section 2 of the 1958 Act provided that these lands would be held in trust by the United States and that they were "hereby added to and made a part of the existing reservation[ ]."

The ceded strip contains portions of three Montana counties—Big Horn, Treasure, and Yellowstone—and various other state political subdivisions which provide a full range of governmental services. Neither presently nor at any time since the 1904 Act has the Tribe exercised governmental control over the ceded strip.

B. Ceded-Strip and Reservation Coal Mining

The sole coal production currently taking place on the ceded strip is at Westmoreland's Absaloka mine. Westmoreland and the Tribe first entered into a lease for coal production in 1972, which was superseded by another in 1974. The lease has been amended several times and now applies only to a ceded-strip area denominated as Tract III. None of the surface lands in Tract III was restored to beneficial tribal ownership under the 1958 Act, and title to virtually all such lands has been acquired by Westmoreland. The 1974 lease provided to the Tribe royalties among the highest, if not the highest, of those then received by any Indian tribe within the United States, and through October 1983 Westmoreland had paid $17.8 million in royalties to the Tribe.

Actual operation of the Absaloka facility has been contracted by Westmoreland to another non-Indian company. Westmoreland's and its contractor's mining activities at the facility are subject to comprehensive regulation under state and federal statutes. Westmoreland,

as an example, received its first permit from the Montana Department of State Lands under the Montana Strip and Underground Mine Reclamation Act, Mont. Code Ann. §§ 82-4-201 to 254 (1985), to begin mining operations in 1974 and subsequently received 15 other new or amended permits. After enactment of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201 to 1328, Montana's state reclamation plan was submitted and approved under 30 U.S.C. § 1235, and pursuant to that plan the Department of State Lands regulated the Absaloka facility.[4] Other state agencies, such as the Department of Health and Environmental Sciences, the Department of Natural Resources and Conservation, and the Department of Labor and Industry, additionally regulate the mine's activities, while Westmoreland and the mine's employees directly benefit from local government infrastructure and related services. The Tribe has exercised no regulatory control over the facility.

No on-reservation coal production by any producer has occurred, and no lease contemplating such production exists. In 1972 Shell Oil Company and the Tribe did negotiate a coal-production lease covering approximately 30,000 acres in the southern part of the reservation. The Tribe filed a lawsuit in 1974 against Shell and the Secre-

---

[4]Subsequent to trial, the Department of the Interior promulgated regulations under which it deemed the beneficial ownership interest by a tribe in any coal, including that underlying non-Indian-owned lands on the ceded strip, to be "Indian lands" as defined in 30 U.S.C. § 1291(9). 49 Fed. Reg. 38462 (Sept. 28, 1984). The Office of Surface Mining Reclamation and Enforcement was given exclusive regulatory authority over such Indian lands. *Id.* at 38478. Montana filed suit challenging this aspect of the regulations, and the action was eventually dismissed by stipulation on the basis of a Memorandum of Understanding between the State and the Department of the Interior. (App. 259a-270a.) The memorandum provides, in relevant part, that the more stringent of state or federal program standards will be applied to ceded-strip mining activities and that the Department of State Lands has lead enforcement responsibilities.

tary of the Interior to void that agreement, but later negotiations led to a new lease in 1980. Secretarial approval of the 1980 lease, however, was delayed until 1983. The 1980 lease provided for primary coal development in an area known as Young's Creek, consisting of approximately 2560 acres and located near the Montana-Wyoming border. Shell surrendered its rights under the lease in December 1985 without beginning actual construction of a mine.

C. The State Taxes

As enacted in 1975 and presently codified, the Montana coal severance tax, Mont. Code Ann. §§ 15-35-101 to 205 (1985), contains a tax rate schedule based on heating quality and type of mining operation, with a tax rate of 30 percent of "value" imposed on surface mining of coal having a per-pound BTU rating equal to or above 7,000. § 15-35-103(1). The term "value" means the "contract sales price" which is defined in section 15-35-102(5) as the FOB mine price minus various deductions. The tax is due quarterly, and among the deductions allowed for quarterly production periods ending on or after September 15, 1984, are specified amounts of royalties owed to Montana, the United States, and any federally recognized Indian Tribe. §§ 15-35-102(5)(a)-(d), 15-35-104.[5] West-

---

[5]The Montana Legislature enacted several amendments since the district court trial which are relevant to the severance tax's rate. First, under 1985 Montana Laws, chapter 636 (*codified in* Mont. Code Ann. §§ 15-35-201 to 205 (1985)), it provided a tax credit of 33 1/3 percent for any incremental coal production produced and sold during calendar years 1985 and 1986. 1987 Montana Laws, chapter 608, section 5, extended the production incentive tax credit provisions to additional periods and, for incremental coal production sold between January 1987 and June 1990, increased the rate of the tax credit. (App. 227a-240a.) Section 3 of the 1987 session law also provided that, should the

(Continued on following page)

moreland paid Montana $53.8 million in severance taxes through 1982 as to ceded-strip production and thereafter deposited its quarterly payments into the district court's registry pursuant to a preliminary injunction entered in January 1983; with accrued interest, the escrowed funds now total approximately $26 million. The Tribe has no responsibility for paying severance taxes with respect to Absaloka production and has paid none.

Section 15-35-108 directs disposition of the severance tax proceeds into particular state funds or accounts. At the time of trial, 50 percent of the proceeds was placed into a coal severance tax trust fund established under Art. IX, section 5 of the Montana Constitution to address the environmental and socioeconomic impact of large-scale coal mining and six percent into a highway construction trust fund account. The remainder was distributed to various funds or uses including the local impact and education trust fund account, public school equalization aid, and a nonexpendable trust fund utilized for parks acquisition or management and other aesthetic or cultural purposes.[6]

(Continued from previous page)

Montana Department of Revenue determine coal produced in the state between July 1, 1987, and June 30, 1988, exceeds 32.2 million tons, the tax rate for coal of the BTU quality by Westmoreland on the ceded strip will be reduced to 25 percent for coal produced between July 1, 1988, and June 30, 1990, to 20 percent for coal produced between July 1, 1990, and June 30, 1991, and to 15 percent for coal produced after June 30, 1991. (App. 234a-235a.) However, even if the 32.2 million ton production amount is not exceeded, the percentage tax rates for coal with a heating quality of 7,000 or more BTUs per pound will be reduced under the new law to 25 percent for fiscal year 1990 and to 20 percent for fiscal year 1991 and thereafter. (App. 232a-233a.)

[6]Section 15-35-108 has been modified since trial, but, as presently codified, the general allocation scheme remains comparable. See 1987 Mont. Laws, ch. 662, § 1 (App. 241a-243a).

The coal gross proceeds tax, Mont. Code Ann. §§ 15-23-701 to 704 (1985), is imposed annually by the county in which the particular mining activity occurs. § 15-23-702. The producer is required to report the dollar amount of its gross yield or value, calculated in the same manner as the "contract sales price" under section 15-35-102(5), and the tax is determined by the application of the county property tax mill levy against the assessed value. §§ 15-23-701, -702, -704. The mill levy will vary by county and is adjusted each fiscal year. All Westmoreland ceded-strip production has taken place in Big Horn County. Westmoreland had paid approximately $8.1 million in gross proceeds taxes as of December 31, 1982. As with severance taxes, the Tribe has no responsibility for payment of gross proceeds taxes.

III. DISTRICT COURT AND APPELLATE DECISIONS

The district court entered lengthy findings of fact and conclusions of law. It first found that Westmoreland's coal production will have various environmental and socioeconomic consequences, some of which are not presently known and cannot be definitively measured. (App. 42a-43a.) The court further observed that coal mining is often associated with a boom-and-bust cycle, alternately creating substantial, new demands for governmental services and then eradicating the economic base upon which revenue to support those services is predicated. (App. 42a, 50a-53a.) The severance tax rate, according to the findings, derived from the "best estimate of the short and long-term costs to the state from coal mining" and, together with the coal gross proceeds tax, was "designed to promote orderly development which would protect the environment and the interests of Montanans and to make coal development pay its fair share." (App. 52a.) The court further stated that the severance tax was intended not "to

capture the maximum economic rents or excessive profits'' but (1) ''to provide front end financing to communities and agencies faced with rapid increases in demands for various services;'' (2) ''to remedy problems created by jurisdictional mismatches;'' and, significantly, (3) ''to respond to problems, both foreseen and unforeseen, that will arise when coal mining operations cease.'' (App. 52a-53a.)

Second, the district court carefully reviewed divergent expert testimony concerning the impact of the challenged taxes on the marketability of ceded-strip coal. It concluded that coal-sourcing decisions by large buyers, such as the utilities which purchase virtually all of Westmoreland's Absaloka production, are affected by economic and noneconomic factors such as (1) the delivered, and not simply the FOB mine, price of coal; (2) the physical and chemical composition of coal insofar as it affects suitability for use in certain boilers or under specific pollution-control requirements; and (3) production reliability. (App. 56a-58a.) The largest component of delivered cost is ordinarily the expense of transportation which the court found is ''the major factor in determining the logical marketing area for a mine's production.'' (App. 57a.)

In its conclusions of law, the district court rejected Montana's position that the 1958 Act did not restore to the Tribe beneficial ownership of coal interests except, arguably, those interests underlying restored surface acreage. It instead reasoned, largely on the basis of legislative history, that the Act restored to trust status not only reserved mineral interests underlying the vacant and undisposed-of surface lands referred to in the statute but also reserved mineral interests underlying surface areas not subject to restoration. (App. 61a-62a.) The court, nonetheless, concluded that these mineral interests were not returned to ''reservation'' status under section 2 of the Act, stating that such status ''has little significance in describing a tribally-owned mineral estate which lies out-

side the surface boundaries of a tribe's reservation[.]" (App. 63a.) It further found no support in the legislative history "for the anomalous proposition that Congress extended governmental powers and attributes of a tribe's inherent sovereignty to the subsurface estate in an area outside the boundaries of a diminished reservation where the surface is held predominately by non-Indians." (*Ibid.*)

Applying the preemption principles traced in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), as directed by the court of appeals in *Crow I*, the district court determined applications of the gross proceeds and severance taxes to ceded-strip mining activity was not preempted. The court reasoned that the trial evidence did not establish any adverse effect from the taxes on the Tribe's control over leasing its mineral interests or on the development of those interests and that the taxes were justified by Montana's governmental responsibilities within the ceded strip even if tribal economic development had been somewhat adversely affected. (App. 67a.) It found no impermissible infringement on tribal sovereignty by the taxes as to ceded-strip production since, most importantly, the Tribe has no sovereign, or governmental, responsibility for the ceded strip and its royalty interest in the coal was neither legally different from that of any other lessor nor impaired by the taxes. (App. 70a-71a.)

The district court, finally, found that no justiciable controversy warranting declaratory relief existed with respect to application to the gross proceeds and severance taxes to coal production on the reservation. It noted the absence of any coal development within the exterior boundaries of the reservation, the possibility that production might not occur under the Shell agreement because of a depressed coal market, and the lack of evidentiary detail concerning the effect of such mining activity. (App. 60a.)

In reversing, the court of appeals first stated that the district court's ceded-strip preemption analysis was ex-

clusively based on *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), and the notion that, because Westmoreland's production has taken place outside the reservation, state taxation was permissible in the absence of a contrary congressional enactment. (App. 6a-7a.)[7] It then said that, because one of the policies underlying the Indian Mineral Leasing Act of 1938, 52 Stat. 347 (*codified as amended in* 25 U.S.C. §§ 396a to 396g) (1938 Act), was "to insure that Indians received 'the greatest return from their property'" (App. 8a-9a), unrebutted evidence establishing that the gross proceeds and severance taxes had "at least some negative impact on the coal's marketability" (App. 12a) would compel preemption unless justified by legitimate state interests. Rejecting the district court's contrary findings, the court gleaned such negative impact from the greater post-1975 increase of Wyoming-based coal production and its related conclusion that "the taxes imposed are the components that differ most clearly between [the two states]." (App. 12a.)[8] The court rejected as insuf-

---

[7]The court of appeals erred in this reading of the district court's decision. As developed above, the district court applied the *White Mountain* interest-balancing standard as required by *Crow I*, expressly refusing to adopt Montana's argument that *Jones* controlled resolution of the ceded-strip preemption question. (App. 64a-65a.)

[8]In determining that the gross proceeds and severance taxes were responsible for the difference in the rate of coal production growth from Montana and Wyoming mines, the court of appeals relied on a marketability analysis offered by the Tribe and United States. Through its expert testimony, Montana criticized the Tribe and United States' approach as grounded on a highly unrealistic economic model which failed to consider adequately either the difference in the traditional markets for Montana and Wyoming coal or the myriad factors influencing a utility's determination to use certain coal. The district court credited Montana's analysis on the marketability question. (App. 56a-59a.) The court of appeals' redetermination of these facts was in clear disregard of Fed. R. Civ. P. 52(a) and evidenced its general pattern of ignoring the trial court's findings.

ficient Montana's claimed interests, which it restrictively identified as raising revenue to offset the costs of additional governmental services required by Westmoreland's activities and "of treating the pollution and solid waste disposal that attend coal production." (App. 13a.) It stated, again relying on the Tribe and United States' expert testimony and discounting the findings below, that the governmental expense associated with coal-related population growth was more than met through other revenue generated by the mining activity and that the unquantifiable cost attendant to possible, adverse environmental effects from coal production was adequately addressed through existing federal and state regulation. (App. 15a-16a.)

The court of appeals next held the gross proceeds and severance taxes infringed upon the Tribe's sovereignty and were, therefore, preempted without reference to the 1938 Act. The court found that the taxes were levied against mineral resources, which it deemed "'a component of the reservation land itself,'" and, yet again ignoring the district court's findings, that tribal self-government and development were frustrated by the taxes.

Lastly, the court of appeals rejected the district court's determination that no justiciable controversy existed warranting declaratory relief with respect to the on-reservation coal production, observing that the challenged taxes are in place and concluding, without any evidentiary support in the trial record, that "[b]ecause of the taxes, the [non-Indian] lessee cannot find a buyer, making it difficult for Crow to find a lessee." (App. 20a.) The court then summarily proceeded to the merits of this issue and held the taxes preempted for those reasons discussed in connection with the ceded strip.

———o———

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. The Validity Of The Gross Proceeds And Severance Taxes As To Ceded-Strip Production Is A Matter Of Significant Importance To The Parties And Presents A Substantial Federal Question.

The policy and practical importance of the ceded-strip preemption issue is undisputed. Montana's authority to impose its severance and gross proceeds taxes on Westmoreland, or a similarly-situated coal development lessee, raises a fundamental jurisdictional question concerning a state's right to enforce otherwise nondiscriminatory and valid taxing statutes against a non-Indian producer which is engaged in mining a tribally-owned mineral resource outside the boundaries of a reservation. When the producer enjoys the full range of state and local government services and is not subject to regulation by a tribe in its governmental capacity, the question becomes even more compelling. This issue has never been addressed by the Court, and the court of appeals' decision strikes at the very heart of state sovereignty. Moreover, aside from the profound jurisdictional question, the amount in controversy—$100 million—underscores its practical importance.[9]

There is also no dispute the ceded-strip preemption issue presents a purely federal question. Its resolution

---

[9]As stated above, the district court-established escrow fund now contains approximately $26 million in severance tax payments and accrued interest. Although such amount is itself obviously significant, prior tax payments are at issue both through a cross-claim filed by Westmoreland seeking refund of all gross proceeds and severance taxes paid by it prior to October 1982 and through a constructive trust claim by the Tribe as to pre-1983 nonescrowed payments. With respect to the latter claim, the Tribe submitted trial exhibits placing the amount sought as high as $78.8 million. Future tax revenues from Westmoreland production will, of course, also be substantial.

thus requires deciding subsidiary matters such as (1) the effect of the 1958 Act on the mineral interests underlying, *inter alia*, Tract III of the ceded strip, (2) whether, if these interests have been returned to "reservation" status under the 1958 Act, such status has controlling significance in determining applicable preemption standards, (3) the preemptive scope of the 1938 Act under the facts here, and (4) the nature of the Tribe's sovereignty interest with respect to ceded-strip production. These subsidiary issues must be answered exclusively with reference to federally developed principles. *See, e.g., National Farmers Union Insurance Companies v. Crow Tribe*, 471 U.S. 845, 852-53 (1985); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978).

A. Preemption by Federal Statute

The Court's previous Indian law decisions have recognized an analytical dichotomy as to a state's on- and off-reservation taxing authority. *Compare Mescalero Apache Tribe v. Jones*, 411 U.S. at 147-49, *with White Mountain Apache Tribe v. Bracker*, 448 U.S. at 141-45, *and Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832, 837-39 (1982).[10] While, on the face of the

---

[10]*Jones* arose from a challenge to gross proceeds and use taxes imposed upon a tribally-owned ski resort. The resort was located outside the exterior boundaries of the tribe's reservation on national forest lands, but the land on which it was situated was deemed to be held in trust for the tribe by the United States within the scope of 25 U.S.C. § 465. 411 U.S. at 155 n.11. Despite the trust and tax-exempt status of the land and the fact that the taxes were directly imposed upon the tribe, the Court upheld imposition of the gross proceeds tax since, "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Id.* at 148-49.

(Continued on following page)

uncontroverted facts here, *Jones* dictates a conclusion that the gross proceeds and severance taxes may be constitutionally applied to coal production on the off-reservation ceded strip, the court of appeals justified its purported application of *White Mountain* interest-balancing standards by judicially redrafting the 1958 Act. Having effectively redrawn reservation boundaries, the court then rewrote the district court's factual findings and, relying on a palpable misinterpretation of this Court's recent decision in *California v. Cabazon Band of Mission Indians*, 107 S. Ct. 1083 (1987),[11] effectively abandoned all pretext

---

(Continued from previous page)

In contrast to *Jones* are, most importantly, *White Mountain* and *Ramah Navajo School Board v. Bureau of Revenue, supra*, which involved the imposition of state taxes on non-Indian concerns doing business with tribally-controlled entities within reservations. *White Mountain*, whose analysis controlled the result in *Ramah*, began its preemption analysis by noting that "two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members" exist: (1) preemption by federal law, and (2) infringement " 'upon the right of reservation Indians to make their own laws and be ruled by them.' " 448 U.S. at 142. The Court recognized that difficult questions are often presented by a state's assertion of regulatory authority over non-Indians within a reservation, which "call[] for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *Id.* at 144-45.

[11]The court of appeals read *Cabazon* as "increas[ing] the presumption against finding legitimate state interests" in Indian taxation matters. (App. 15a.) Obviously enough, though, *Cabazon*—which was not a taxation case—merely noted the already well-settled principle that tribes and their members enjoy immunity from state taxes as to on-reservation activities absent an express, contrary congressional authorization. 107 S. Ct. at 1091 n.17; *see, e.g., Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985). Consequently, in the context of such on-reservation direct taxation of tribes or their members, no interest rebalancing is necessary. *Cabazon* did not establish, as the court of appeals suggested, new preemption standards germane presently.

of interest balancing by establishing "legitimate state interests" criteria calculated to relegate to preempted status any state tax except one closely approximating a user fee. In every material respect its analysis manifests fundamental misapprehension of controlling statutory provisions, Fed. R. Civ. P. 52(a), and this Court's decisions.

The court of appeals concluded in *Crow I* (App. 98a-99a), and reaffirmed in the decision below, that the interest-balancing analysis of *White Mountain* applied here. That determination derived from its construction of the 1958 Act that all mineral interests in ceded-strip lands reserved by the United States were deemed returned to "reservation" status. The court's interpretation, however, neither finds support in the Act's language, which unambiguously restored only carefully-calculated surface acreage, nor comports with its simultaneous statement that

> [t]he 1958 Act does not give the tribe jurisdiction over the surface of the ceded strip. The Act restored only the mineral interests to tribal ownership. These interests were once part of the reservation and remain adjacent to it.

(App. 7a n.1.)[12] The court's reasoning, irrespective of its radically skewed vision of the 1958 Act, also represents

---

[12]The court of appeals' statement recognizes that "reservation" status under section 2 of the 1958 Act was intended to mean only, at least with respect to the Crow Reservation, trust status and not, as its opinion otherwise indicates with respect to the mineral estate, actual redrawing of the reservation's boundaries. That no such redrawing was intended is reflected in S. Rep. No. 1508, 85th Cong., 2d Sess. (1958), accompanying the bill eventually adopted as the 1958 Act. The Senate report contained a letter from the Department of the Interior recommending various changes to the original bill, which were incorporated, and commenting that, "[i]n case of the Crow Tribe, the restored lands are outside the boundaries of the diminished reservation, and the Tribe has indicated that it will probably want to negotiate sales or exchanges in order to make the best use of the

(Continued on following page)

a quintessential example of elevating form over real-life substance. Whether or not the coal underlying Tract III or any other portion of the ceded strip has been restored to "reservation" status under the 1958 Act, it is uncontroverted that Westmoreland's activities occur on lands which are outside the reservation's boundaries, are non-tribally owned, and are subject to state, local, and generally applicable federal, but not tribal, regulation. The court of appeals' invocation of *White Mountain* standards thus rests on an extraordinary legal fiction unsupported by any decisional authority of this Court. Application of *White Mountain,* rather than *Jones,* standards presents a substantial federal question.

Moreover, even if an interest-balancing approach is appropriate, this matter presents a range of circumstances unlike those in previous cases. First, aside from *Jones,* the Court has never addressed the question of a purported exemption from state taxes where the taxed activity occurred outside a reservation. This is an important consideration (*White Mountain,* 448 U.S. at 151) which has distinct governance consequences and which the court of appeals ignored by extending the same analysis to both ceded-strip and reservation preemption issues. As developed above, Montana and its political subdivisions provide all governmental services on the ceded strip generally and to Westmoreland's mine specifically; the Tribe provides none. The precisely opposite situation adhered in *White Mountain* where the motor carrier license and use fuel taxes were assessed on the basis of the non-Indian company's use of federally-maintained reservation roads as to which the state had no responsibility; in *Ramah,*

(Continued from previous page)

lands." (App. 254a.) The report also did not mention restoration of mineral estates and, to the extent it discussed the land subject to restoration, referred only to surface acreage. The Tribe clearly understood the Act's limited purpose at the time of its consideration by Congress. See Statement of Edward P. Whiteman (App. 257a-258a).

where the gross receipts tax was imposed on a non-Indian contractor engaged in constructing federally and tribally-sponsored school facilities which the state had declined to provide; and in *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 342 (1983), where the state sought to assert concurrent jurisdiction over nonmember hunting and fishing within a reservation even though it had never "contribute[d] in any significant respect to maintenance of these resources and [could] point to no other 'governmental function it provides[.]'" The state governmental interests here are not only far stronger than in *White Mountain* or later cases but are also clearly not limited, as the court of appeals held, to costs demonstrably and directly associated with Westmoreland's production.

Second, *Crow I* determined that the legal incidence of the gross proceeds and severance taxes falls on the non-Indian producer, Westmoreland, and not the Tribe. (App. 87a-90a.) This conclusion vitiates any preemption claim predicated on notions of tribal immunity from state taxation since, "[o]nce mined . . . , title to the coal is vested as personal property in the lessee or permittee as soon as it is mined and removed from its original place, subject only to the royalty rights of the lessor." *Commonwealth Edison Company v. Montana*, 189 Mont. 191, 211, 615 P.2d 847, 858 (1980), *aff'd*, 453 U.S. 609 (1981).[13] The present

---

[13]The court of appeals' analysis below failed to recognize the full implication of *Crow I*'s incidence holding. The court thus relied heavily on the discussion in *Cabazon* of *Indian immunity* from state taxation in opining, as noted above, that "[t]he Supreme Court has increased the presumption against finding legitimate state interests." (App. 15a.) It later stated that "[a]ny assertion of state authority over *tribal interests* must be assessed against the traditional notions of Indian sovereignty" and that "Montana taxes mineral resources that *are* 'a component of the reservation land itself[.]'" (App. 19a (emphasis added).) Nonetheless, unlike the *Cabazon* gambling regulation, the challenged taxes here are imposed on non-Indians and on the contract sales value of the mined coal—not, as the court of appeals' analysis suggests, on the Tribe or on the *in situ* value of the coal.

matter, moreover, does not involve, as *White Mountain* and *Ramah* did, taxes based upon a value determined exclusively with reference to a narrow, closed business relationship between tribal and nontribal entities and contractually passed through to the tribe. *White Mountain,* 448 U.S. at 140; *Ramah,* 458 U.S. at 835. The taxes clearly impose no economic burden on the Tribe. *See Ramah,* 458 U.S. at 844 n.8. Finally, any generalized federal interest in tribal economic development (*cf. Cabazon,* 107 S. Ct. at 1092-93) has never been extended by this Court to prohibit an indirect adverse effect of state taxes on a tribe caused by taxation of nonmembers, and *Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134, 151 n.27, 156-57 (1980), strongly indicates such interest may not be so expansively applied. *Accord Moe v. Confederated Salish and Kootenai Tribes,* 425 U.S. 463, 482 (1976); *see also California State Board of Equalization v. Chemehuevi Indian Tribe,* 106 S. Ct. 289 (1985) (*per curiam*).[14]

Third, and most significantly, the court of appeals' decision was predicated on an extreme view of the 1938 Act's preemptive scope. The court thus held that preemption is presumptively mandated by the Act whenever there is "at least some negative impact on the coal's marketability" (App. 12a) and then narrowly circumscribed the "legitimate" state interests which may serve

---

[14]The Tribe has pointed to a 1982 amendment to the Westmoreland lease, under which it receives an amount equal to the gross proceeds and severance taxes not paid to Montana, as evidence of the taxes' direct impact. Unlike the tribal entities in *White Mountain* and *Ramah,* though, the Tribe unquestionably pays none of the tax amounts and, to the extent its financial interests would be furthered by recovering monies otherwise tendered to Montana, stands in no different position than the tribal smokeshops in *Washington v. Confederated Tribes of Colville Ind. Res.,* 447 U.S. at 156, since this element of profit derives solely from a claimed exemption to state taxation.

to rebut that presumption.[15] Its reasoning, which derived from an independent reassessment of trial evidence and conflicted with the district court's factual findings, was premised on the notion that the gross proceeds and severance taxes have made ceded-strip coal less marketable and thereby decreased potential tribal royalties. Nonetheless, even if the court of appeals' factual conclusions were correct and even though one of the goals of the 1938 Act was "to insure that Indians received 'the greatest return from their property' " (*Montana v. Blackfeet Tribe*, 471 U.S. at 767 n.5), nothing in the Act suggests that non-Indian lessees like Westmoreland mining outside a reservation must be exempted from tax liability in the hope that such exemption will, in whole or part, be passed on to the tribal lessor.[16] The court of appeals' sweeping analysis, logi-

---

[15]The court of appeals thus did not actually apply an interest-balancing analysis but simply held the gross proceeds and severance taxes preempted in the absence of a showing that the revenues generated by them corresponded to those costs directly flowing from operation of the Absaloka facility. The taxes, however, are general revenue measures, not fees for services rendered, and are designed to fund a broad range of present and future governmental activities—some having particular applicability to Westmoreland's mine and others more generally relating to the "privileges of living in an organized society[.]" *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 522 (1937).

[16]S. Rep. No. 985, 75th Cong., 1st Sess. (1937), served as the source for the objectives of the 1938 Act identified in *Blackfeet*. However, nothing in that report discussed the issue of taxation, and the report, insofar as it mentioned "achieving the greatest return from [Indian] property" focused only on the need to tailor tribal mineral leases to the geological characteristics of the particular deposit—flexibility which the Department of the Interior believed was denied under then-existing law. *Id.* at 2-3 (App. 246a-248a). Similarly, neither the Act nor its implementing regulations address any matters, including taxation, which pertain to the relationship between a lessee and a state after the lessee has assumed ownership of the involved mineral.

cally extended, permits tribes to acquire mineral resources off-reservation and, under the protective aegis of the 1938 Act, bestow a vicarious tax exemption upon non-Indian lessees.

In sum, the facts and governing statutes here differ materially from those in *White Mountain* and *Ramah* whose analytical standards were nominally applied by the court of appeals. Whether those standards are relevant and, if so, how the competing state, federal, and tribal interests should be balanced present an important federal question warranting determination by this Court.

B. Infringement on Tribal Sovereignty

The court of appeals concluded that the gross proceeds and severance taxes are preempted without reference to the 1938 Act because they impermissibly interfere with the Tribe's sovereignty. It reached this result even though recognizing that the Tribe has no governmental jurisdiction over the ceded strip and has constitutionally disclaimed any right to tax nonmember activities outside the reservation's boundaries.[17]

The use of tribal sovereignty as an independent barrier to the assertion of state laws has, as most recently indicated in *Rice v. Rehner,* 463 U.S. 713 (1983), been largely undermined by *White Mountain* and later decisions. Sovereignty values should instead be considered as part of that complex of state, federal, and tribal interests required to be balanced in determining whether preemption has occurred. Where no tradition of immunity

---

[17]Although the Tribe adopted in 1982 an ordinance imposing a 25 percent severance tax on both reservation and ceded-strip coal production, the Department of the Interior has refused to approve the ordinance as to ceded-strip mining because of the constitutional disclaimer and concern over whether such taxing authority exists off-reservation irrespective of the disclaimer. (App. 53a.)

from state regulatory authority exists as to a particular matter, the tribal sovereignty interest will ordinarily have little weight. *Rehner*, 463 U.S. at 719-20. Instantly, there is no such tradition—since the Tribe has no governmental responsibility for the ceded strip and, more specifically, no taxing powers as to Westmoreland's activities thereon. The asserted significance of its sovereignty interest is thus reduced, as reflected in the court of appeals' opinion, to the alleged indirect economic impact of the taxes.[18]

Whether notions of tribal sovereignty have any application to off-reservation taxing by a state has never been addressed by this Court. *Jones* strongly suggests that they do not. Nevertheless, even if it is assumed that *White Mountain* standards are appropriate and interest balancing therefore necessary, the court of appeals' reasoning ignored both the absence of an established tradition of authority to control, as a sovereign and not merely mineral owner, Westmoreland's activities on the ceded strip and *Washington v. Confederated Tribes of Colville Indian Reservation, supra,* in which the Court stated, with reference to on-reservation cigarette sales, "that the Tribes have no vested right to a certain volume of sales to non-Indians, or indeed to any such sales at all." 447 U.S. at 151 n.27. Thus, as the Court also observed in *Colville:*

> While the Tribes do have an interest in raising revenue for essential governmental programs, that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services. The State also has a legitimate governmental interest in raising revenues and that

---

[18]It must be emphasized that Montana has not attempted, and has no incentive, to prevent the Tribe from leasing its coal interests on the ceded strip. This matter markedly differs from *Cabazon*, 107 S. Ct. at 1094, where "the current federal policy is to promote precisely what California seeks to prevent."

> interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services.

Id. at 156-57. Aside from the nature of the commodity and irrespective of whether the Tribe is simply "marketing [its] tax exemption to nonmembers" (*id.* at 157), *Colville,* when read with later cases, militates against the court of appeals' exclusive reliance on the purported economic impact of the taxes as a sufficient basis to find impermissible interference with tribal sovereignty. Whatever value ultimately is assigned to such sovereignty interest under the circumstances here, however, the court's analysis and conclusion on the sovereignty issue present a substantial federal question.

II. The Court Of Appeals' Determination That A Justiciable Or Ripe Controversy Exists Concerning The On-Reservation Validity Of The Gross Proceeds And Severance Taxes Raises A Substantial Federal Question.

The court of appeals not only reversed the district court's determination that no justiciable controversy warranting declaratory relief existed as to on-reservation application of the gross proceeds and severance taxes but also concluded that the taxes were preempted. It found a justiciable controversy since, allegedly because of the taxes, "the lessee cannot find a buyer, making it difficult for Crow to find a lessee." (App. 20a.) The grounds for preemption were those upon which the taxes' invalidity as to ceded-strip production was predicated.

The decision below determined important rights in a factual vacuum and in the absence of "a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *White Mountain,* 448 U.S. at 145. The court thus declared unconstitutional the gross

proceeds and severance taxes even though there has been no coal production within the reservation and, therefore, no opportunity to observe their effects on government services. This determination, which is factually intensive and difficult (*cf. Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 629 (1981)), cannot be made on the present record and should not be attempted without a project sufficiently defined to permit reasoned impact analysis. *See, e.g., Hodel v. Virginia Surface Mining & Reclamation Association,* 452 U.S. 264, 295 (1981); *Babbitt v. United Farm Workers National Union,* 442 U.S. 289, 304 (1979). Indeed, the United States argued against the granting of certiorari to review *Crow I* precisely "because the courts below have not yet developed a record or made factual findings upon which such a particularized inquiry would rest." Brief for the United States as Amicus Curiae, O.T. 1982, No. 81-1852, p. 8. The court of appeals' summary rush to judgment as to this aspect of the case raises a significant federal question under the justiciability or ripeness doctrines[19] and Indian law principles.

———o———

[19]*Compare Aetna Life Ins. Co. v. Haworth,* 300 U.S. 227, 240 (1937) (a justiciable controversy under U.S. Const. art. III "must be a real and substantial controversy, admitting of specific relief through a decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts"), *with Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n,* 461 U.S. 190, 201 (1983) ("the question of ripeness turns on 'the fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration' "); *see generally* 13A C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3532.1 (2d ed. 1984) ("[t]he line [between the justiciability and ripeness doctrines] is so thin that no substantial benefit is to be gained by efforts to draw it").

CONCLUSION

The appellants respectfully request that probable jurisdiction be noted and that plenary briefing and argument on the merits be ordered.

Respectfully submitted,

MICHAEL T. GREELY*
Attorney General of Montana
CLAY R. SMITH
Assistant Attorney General
State of Montana
Justice Building
215 North Sanders
Helena, MT 59620-1401
(406) 444-2026

JOHN W. ROSS
Special Assistant Attorney General
P.O. Drawer 849
Billings, MT 59103
(406) 268-1611

Attorneys for the Appellants

*Counsel of Record

August 1987